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INTERNATIONAL LAW AND EAST TIMOR

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I am very honored by this opportunity to speak in Coimbra, one of the oldest and most notable European institutions of higher learning. I should like to address primarily two issues: A. the legal characterization of the East Timor matter;[1] and B. the implications of the rules on recognition for states faced with Indonesia's illegal presence in East Timor.[2] On the second of these points, I have in mind particularly Australia's actions in negotiating the "Timor Gap" treaty with Indonesia. The proceedings against Australia which Portugal introduced in the International Court of Justice on 22 February 1991 address this latter item, but in a somewhat different manner from my approach and I shall also refer briefly to those proceedings.

I first became closely involved with the Timor case in the late 1970s when I was asked to discuss it in a petition to the Fourth Committeee of the General Assembly (a committee of the whole which deals with decolonization matters) on behalf of the

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[1] See generally, Clark, "The 'Decolonization' of East Timor and the United Nations Norms on Delf-Determination and Aggression," 7 Yale Journal of World Public Order 2 (1980).

[2] See generally, Clark, "Timor Gap: The Legality of the 'Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia'," forthcoming in [1992] Pace Yearbook of International Law.

International League for Human Rights. It immediately occurred to me that there were at least three different ways to characterize what seemed clearly to be illegal actions on the part of Indonesia. One was to describe them as a breach of the principle of self-determination contained in Articles 1 and 55 of the United Nations Charter and its 1960 resolutions on the subject.[3] A second was to analyse them as a breach of the Charter prohibitions on the use of force, notably Article 2, paragraph 4, and Chapter VII of the Charter, as interpreted in the Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States and its 1974 resolution defining Aggression. A third way was to characterize the actions as breaches of fundamental standards of human rights.

It seemed to me that, while the actions of the Indonesians certainly amounted to breaches of basic human rights doctrine, making a legal case in these terms - egregious as it all was - did not capture the full flavor of the event.[4] It did not go far enough. Human rights violations are, in a sense, matters of detail - here the whole system of Indonesian presence was illegitimate. No matter how benignly they were to behave, they simply had no

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[3] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No.16) at 66, U.N. Doc. A/4684 (1960); Principles which Should Guide Members in Determining Whether or Not to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), id., at 29.

[4] A similar approach to my own is well addressed at several points in Paula Escarameia, Formation of Concepts in International Law: Subsumption Under Self-Determination in the Case of East Timor (unpublished S.J.D. dissertation, Harvard Law Scholl, 1988).

legal or moral right to be there. Putting it another way perhaps, to make the human rights argument entailed the risk of conceding the legitimacy of the Indonesian presence. It was as if it were all right that they were there, and that the important question was how they behaved. While it is right, then, to criticize the Indonesians for the outrageous behavior to the Timorese citizenry - as we criticized the action of Iraq in Kuwait - it does seem to me that it makes a lot more sense to marshall those kinds of criticisms in terms of breaches of the law of war by an occupying force than it is to criticize for breaches of, say the Universal Declaration of Human Rights. But the real gravamen of the case against Indonesia is in the arguments based on self-determination and on aggression.

So far as the principle of self-determination is concerned, this was a natural way to see the issue from the outset. When Portugal joined the United Nations in 1955, it had denied that it was in control of any non-self-governing territories to which it owed any international obligation under Article 73 of the United Nations Charter. In 1960, however, in its resolution 1542, the General Assembly had determined that Portugal was the administering power over a number of named non-self-governing territories, within the meaning of Article 73 of the Charter, including East Timor. Portugal did not accept the validity of the resolution until 1974. But at the very time of the Indonesian invasion of December 1975, the Fourth Committeee of the General Assembly was engaged in a desultory debate on the territory, with Portugal's participation.

The events of that second date which lives in infamy - 7 December 1975 - led to a much more dramatic resolution from the Committee than might otherwise have been expected. And the Assembly has retained jurisdiction over the matter through its Fourth Committee and its subordinate body, the Special Committeee with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

Indonesia has felt constrained to respond with a number of stock responses that those who block self-determination bring up on such occasions.

They argue that they were asked to come by representatives of the people - a blatantly false assertion.

They rely on the "assent" to incorporation made by the so-called Peoples Assembly that took place in Dili in May of 1976. This claim - based on the representivity and freedom of the Assembly - simply cannot stand in the light of descriptions of the meeting by objective observers such as the representative from the New Zealand Embassy in Jakarta.[5]

They claim historical ties before the colonial period with old empires that never extended as far. They claim that the territory could not be economically viable and hence should not be entitled to independence. This latter claim is flatly denied by Paragraph 3 of the Declaration on the Granting of Independence to Colonial Countries and Peoples which provides that: "Inadequacy of

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[5] Report from Jakarta to Wellington, 1 June 1976, released under the Freedom of Information Act.

political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

When the argument based on the use of force is made, Indonesia again responds with series of text-book responses. One is a kind of self-defence argument - patently false, Indonesia initiated the violence, not the hopelessly outnumbered Timorese.

A second argument is the - still false - argument that they were invited.

A third is some variation on the humanitarian intervention theme - there was a struggle going on and it was necessary to intervene to save lives. This is false. The civil war accompanying the Portuguese withdrawal from the territory was over by the time the Indonesians arrived. Moreover, even the imperative of quelling violence would not extend to justifying annexation and continued presence more than 15 years later. If there is a doctrine of unilateral humanitarian intervention in modern international law it permits a much more modest incursion than this one.

In short, it seems to me that the Indonesian case is a weak one indeed. But what implication does all this have for a state such as Australia in dealing with Indonesia? As is well-known, Australia entered into the so-described "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia." This treaty purports to be an interim solution to the difficult problem of delimiting the continental shelf between Australia and East Timor. (Negotiations

for a permanent solution are presumably "continuing".) The solution is quite complex, but basically it relies upon a sharing of resources by the creation of three areas, one to be jointly developed by Australia and Indonesia, one to be an area of sole Australian jurisdiction but with a percentage of tax revenues allocated to Indonesia, and the other to be an area of sole Indonesian jurisdiction but with a percentage of tax revenues allocated to Australia. In the context of these negotiations Australia asserted that it recognized the Indonesia incorporation of East Timor de jure. Australia has inextricably associated itself with the Indonesian assertion of authority over the offshore resources of East Timor. Needless to say, in putting this as clearly as I possibly can, I do not mean in any way to minimize the blatant illegality of Indonesia's action, but I do mean to criticize strongly the later complicity of Australia.

My contention is simply that Australia is in breach of its international obligations in dealing with Indonesia. In particular, its actions are a breach of language in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States[6] providing that:

> The territory of a state shall not be the subject of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

This language is rather blunt and has an obligatory ring to it.

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[6] G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No.28), U.N. Doc. A/8028 (1970). See to the same effect Art. 5, para. 3 of the 1974 Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1975).

As I have explained in greater length elsewhere,[7] whatever view one may take of the legal effect of General Assembly resolutions as a general matter, this is a special case. It was a unanimously-adopted resolution, carefully drafted over a lengthy period, and apporved on an important ceremonial occasion - the twenty-fifth anniversary of the United Nations. It has a long history in state practice, both unilateral and multilateral. It carries with it both practice and opinio juris, the two fundamental requirements of international customary law. The fundamental nature of the rule which it contains has recently been reinforced in the discussions - and action - over Kuwait and in the re-emergence of the Baltic states in the international community.

It follows that, in my view, the Timor Gap Treaty is fundamentally null and void. Autralia can get no better title to the territory than Indonesia. There are at least two lines of argument why this is so, although they ultimately amount to the same thing. I shall call them the "nemo dat" and "jus cogens" arguments.

Ian Brownlie notes in his leading text on public international law that the maxim "Nemo dat quod non habet" is a "familiar feature of English commercial law, and the principle which the maxim represents is undoubtedly a part of international law."[8] It

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[7] See article, supra note 2.

[8] I. Brownlie, Principles of Public International Law 125 (4th ed. 1990). Brownlie refers to the Island of Palmas Case (Netherlands v. U.S.) 2 Reports of International Arbitral Awards 829 (1928) where the Arbitrator held that Spain could transfer no more territorial rights under the 1898 Treaty of Paris than she

probably makes no difference in law whether Australia was or was not aware of the defect in Indonesia's title, but of course Australia was fully aware from the outset.

The alternative argument is the "jus cogens" one. Article 53 of the 1969 Vienna Convention on the Law of Treaties provides that a treaty "is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." The exact scope of Article 53 is disputed, notably the categories of breaches of international law to which it applies. One thing though is stunning: the basic Charter/Friendly Relations Declaration rule proscribing the use of force is on every significant commentator's agreed list of what are the jus cogens norms.[9]

If Australia were to enter into an arrangement with Indonesia to jointly invade and take over the territory of East Timor, that agreement would clearly be void under the peremptory norm doctrine. I think the logic of the argument is that the same result follows if the territory is shared out after the invasion. This would be true even if Australia had completely clean hands at the point of conquest (a matter disputed by some of Australia's critics.) Now the way in which Australia has tried to avoid the application of one or other of these arguments is by suggesting that its recognition of Indonesian title absolves it. Its position is that

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herself had. In particular Spain could not transfer Dutch territory forming part of the Netherlands Indies (now Indonesia).

[9] See the discussion in L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law 164-64, 323-56 (1988). Needless to say, one can make the same jus cogens argument for the right to self determination.

it can make its own decisions about who it recognizes. This argument will simply not work under modern international law because the recognition itself is void!

I note, in conclusion, that Portugal's case against Australia in the International Court of Justice (so far as I can tell from the Application - I have not yet seen the Memorial) proceeds on the basis of a decidedly modest version of my argument. According to the Application, Portugal is emphasizing the self-determination aspect of the affair rather than the use of force aspect. It asserts that the dispute is about the opposability to Australia of (a) the duties of, and delegation of authority to, Portugal as the adminstering power over the territory and (b) the right of the people of East Timor to self-determination and the related rights to territorial integreaty and unity and permanent sovereignty over natural wealth and resources. Portugal maintains that, in its capacity of administering power, it is performing an international public service and, so long as the United Nations has not discharged it from its responsibility, it is invested with the coreresponding duties and powers, which continue to be opposable, as do the rights of the people of East Timor, erga omnes, and hence to Australia. Australia, by negotiating with Indonesia the Timor Gap Treaty and continuing to negotiate the ultimate delimitation of the continental shelf, is said to have breached, at the least, the obligation to respect the duties and powers of the administering power, the right of the East Timorese to self-determination, and Article 25 of the United Nations Charter.

This way of stating the issue is evidently designed to emphasize both the role of Portugal and the wrong which Australia has committed. It is a version of the analysis that is peculiarly suited to the situation where only these two states are parties before the Court, the jurisdiction of which has not been accepted by Indonesia.

Arguments based on international law, may be made in political forums like the General Assembly; they may be made before the Court of Public Opinion; they may be made before an international tribunal. One of the challenges of an international lawyer is to shape the argument in ways that are appropriate to the forum in question. I have tried in my professional involvement with the Timor issue - and in sharing some ideas with you today - to think particularly in terms of the first two of these types of forum. The drafters of Portugal's Application to the Court have made an interesting effort at shaping the material in a manner that is appropriate for the third - judicial - forum.